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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 609

OWEN SIEBRING

Petitioner

vs.

CHARLES W. HANSEN AND AFSCO, INC.

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MERCHANT, MERCHANT & GOULD
PHILLIP H. SMITH
2330 Rand Tower
Minneapolis, Minnesota 55402
Attorneys for Respondents

Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415

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I.

STATEMENT OF THE CASE

The Hansen patent No. 2,867,314 for an automatic cattle feeder or "bunk feeder" issued on January 6, 1959, and the original infringement suit was instituted on February 12, 1959, against Claude Siebring, d/b/a Siebring Manufacturing Company. The original suit was settled and a consent decree and injunction were entered in October of 1959. Then, the case was reopened in February of 1962 when the motion for contempt was filed. The contempt citation resulted in a holding of contempt and infringement, which was affirmed on appeal, and from which this petition is taken.

Siebring Manufacturing Company was a partnership between Claude Siebring and his son Owen Siebring, and all of the bunk feeders which they produced and sold over the years were produced and sold under the name and style of Siebring Manufacturing Company (RI, p. 134). The son Owen Siebring (petitioner here) was not named a party in the original suit. The father Claude Siebring was at the time of the suit the principal managing agent of the partnership Siebring Manufacturing Company (RI, p. 159). However, the son Owen Siebring actively participated in the suit and was fully familiar with the proceedings leading up to the consent decree and injunction (RI, pp. 134-5).

Owen Siebring, although not a party, participated in discussions leading to the settlement, and appeared and testified at a pre-trial deposition. Further, Owen Siebring signed as a witness the settlement agreement forming the foundation for the consent decree and was fully aware of the terms of the agreement (RI, pp. 134-5). Such settlement agreement provided in part that the plaintiff Hansen was the original and sole inventor of the patent and that the patent was good and valid in law. The settlement agreement further provided that the defendant Claude Siebring, d/b/a Siebring Manufacturing Company, had manufactured and sold devices constituting an infringement of the patent (RI, pp. 11-13). Pursuant to the settlement agreement, the consent decree was filed and a writ of permanent injunction issued strictly enjoining and restraining Claude Siebring, his heirs, employees, associates, servants, privies and those in active consort and participation with him from further infringement (RI, pp. 14-15).

After the settlement of the original action and the entry

of the consent decree and writ of permanent injunction, Siebring Manufacturing Company continued to manufacture and sell bunk feeders which were colorable imitations of and substantially identical to the type of feeders which it was manufacturing and selling at the time of the settlement (346 F. 2d 474, 479, and appendix to petition, pp. A9-A10). The plaintiff's motion for contempt was filed in the District Court on February 1, 1962. Owen Siebring's voluntary intervention as a party defendant was permitted by the court on March 6, 1963, the court stating that Owen Siebring was permitted to intervene as a defendant in the contempt action because he could be jointly liable for plaintiff's damages if contempt was found (RI, p. 48). The court later ruled Owen Siebring's intervention was not permitted for the purpose of relitigating the issue of validity of the patent as already determined by the consent decree (RI, pp. 84-5). The trial of the contempt matter began on March 14, 1963.

U. S. District Judge Hanson, in his opinion reported at 231 F. Supp. 634, held the feeders manufactured and sold by Siebring Manufacturing Company subsequent to the injunction to be colorable imitations and the equivalent of the enjoined feeder. Because of the defendants' insistance, the court also held the defendants' feeders to be infringements of the Hansen patent in the usual sense, as well as a continuation of the infringement specified in the consent decree because of the equivalency of the subsequent feeder to the enjoined feeder of the decree (231 F. Supp. 634, 647).

The question of validity of the Hansen patent was not an issue in the contempt proceeding because of the previous holding of validity in the consent decree, and the de-

fendant Claude Siebring and intervenor Owen Siebring in their post-trial reply brief in the U. S. District Court filed August 30, 1963, admitted on page 18 thereof that the question of validity was not an issue in the contempt hearing (RI, p. 84, 2nd par. of order). Further, the trial court in its decision at 231 F. Supp. 634, 643 stated that the question of validity of the Hansen patent was not an issue in the contempt hearing.

The defendants Claude Siebring and Owen Siebring appealed to the U. S. Court of Appeals for the 8th Circuit, which in its opinion reported at 346 F. 2d 474, affirmed the decision of the United States District Court in all respects. A motion for rehearing by the U. S. Court of Appeals was overruled on June 28, 1965, and the petition for certiorari herein opposed requests a review of the decision denying said petition for rehearing.

II.

NO FEDERAL QUESTION PRESENTED

As will be shown more particularly hereafter, the allegedly erroneous rulings of the U. S. Court of Appeals for the 8th Circuit and the reasons relied upon for the writ by petitioner do not present a federal question which may be reviewed by this Court within the jurisdiction of this Court outlined in Rule 19-1(b).

III.

ARGUMENT

Although it was acknowledged in the post-trial brief filed on behalf of petitioner in the U. S. District Court that the question of validity was not an issue in the contempt proceedings (RI, p. 84), petitioner now controverts this ad-

mission and argues that he should have been permitted to relitigate issues determined in the consent decree prior to his intervention. This is the general substance of the petition, although the petitioner subdivides his argument for certiorari into the following three reasons relied upon for the writ:

> 1. Petitioner's intervention did not prevent him from relitigating issues determined by the previous consent decree.
>
> 2. The findings of the consent decree were not res judicata as to petitioner under the Iowa common law.
>
> 3. Petitioner was denied due process of law because he was not permitted to relitigate issues determined by the consent decree.

Considering these three reasons in order, it will now be shown that none thereof points to any error of the court below. Rather, the decision of the Court of Appeals in refusing to review en banc its earlier decision on appeal as well as the actual decision on appeal, are clearly supported by the applicable authorities.

A. Owen Siebring as intervenor accepted consent decree

The trial court permitted Owen Siebring to intervene "* * * because he may be liable if it is determined that Claude Siebring, the partner of Owen Siebring, has been infringing on the patent of the plaintiff. A partnership is liable in an action for infringement committed in the regular course of the partnership business by one or more of the partners. A manager of the partnership is a joint in-

fringer. *Featherstone v. Cycle*, 53 F. 110; *Trent v. Risdon Iron and Locomotive Works*, 102 F. 635; *Dean Rubber v. Killian*, 106 F. 2d 316, 42 USPQ 493 (8th Cir. 1939); *Walker on Patents*, § 436, Vol. III" (RI, p. 48).

Before the actual trial of the contempt matter, the U. S. District Court made it abundantly clear to the defendants there that the court considered the issue of validity to be res judicata, and would not permit the intervenor Owen Siebring to relitigate issues already determined by the previous consent decree (RI, pp. 93-96, 113-15, 123-24, 126). Pursuant to further requests by the defendants below, the trial court again outlined the estoppel effect of the previous decree in an order filed August 27, 1964 (RI, pp. 84-85). The trial court emphasized that Owen Siebring was allowed to intervene because he could be jointly liable for the plaintiff's damages if contempt was found, but that intervention for this purpose did not require or permit the intervenor to question the validity of the Hansen patent (RI, p. 85). As noted, the post-trial reply brief filed on behalf of the defendants Claude and Owen Siebring (RI, p. 84) even acknowledged that the question of validity was not an issue in the contempt proceeding; however, after the trial court's judgment was adverse to the defendant Claude Siebring and the intervenor Owen Siebring, Owen Siebring then changed his mind and decided that he should have been permitted to contest validity. Thus, the defendants appealed to the U. S. Court of Appeals upon the grounds that the defendant Owen Siebring should have been permitted to intervene for the purpose of relitigating the issue of validity already determined by the consent decree (essentially the same grounds asserted in support of the petition herein opposed).

Accordingly, we have a situation where the defendant Owen Siebring admitted in his post-trial brief filed prior to the trial court's decision that the question of validity was not an issue in the contempt proceeding (RI, p. 84), but having lost at the trial level, then deciding to assert on appeal the opposite argument that he should have been permitted to intervene for the purpose of relitigating the issue of validity. It was stated on page 68 of the appellants' brief before the U.S. Court of Appeals that defendant Owen Siebring did not resist at the contempt trial a course of action precluding reassertion of the defense of invalidity because a finding of noninfringement would have resolved all of the defenses which defendants had raised. The U. S. Court of Appeals for the 8th Circuit held that as a consequence of the intervention, Owen Siebring was required to recognize and accept the existence of the consent decree (346 F. 2d 474, 478, and appendix to petition, pp. A6-A7). This holding by the Court of Appeals is entirely in accord with previous decisions of the U. S. Supreme Court, as well as prior decisions of the 8th Circuit Court of Appeals. This rule which prevents an intervenor from attacking or impeaching previous court orders and decrees made prior to his intervention is often referred to as the subordination rule, since the intervention is in subordination to the previous proceedings to the extent that the intervenor may not go behind orders or decrees previously made by the court.

Mr. Justice Brandeis has stated the rule to be "that intervention will not be allowed for the purpose of impeaching a decree already made." *United States v. California Co-op Canneries,* 279 U. S. 553, 556, 49 S. Ct. 423, 424, 73 L. Ed. 838, 841 (1929). Accord, *Ex parte Jordan,* 94 U. S. 248, 252 (1876).

Accordingly, the intervenor Owen Siebring could not attack the prior decree and relitigate issues determined thereby to any greater extent than his father and the original party Claude Siebring. This is so notwithstanding the fact that the intervenor Owen Siebring signed the original settlement agreement, which incorporated the consent decree, as a witness for his father's signature as a party.

The effect of a completed intervention is to make the intervenor a party in the action; and like an original party, the intervenor is charged with notice of the prior proceedings and is bound by all orders and decrees therein to the same extent as an original party. *Rector v. U. S.*, 20 F. 2d 845 (8th Cir. 1927); *In re Veach*, 4 F. 2d 334 (8th Cir. 1925); *Commercial Electrical Supply Co. v. Curtis*, 288 F. 657 (8th Cir. 1923), cert. den. 263 U. S. 709; *Galbreath v. Metropolitan Trust Co.*, 134 F. 2d 569-570 (10th Cir. 1943), and cases cited therein; *State of Kansas v. Occidental Life Ins. Co., et al.*, 95 F. 2d 935, 936 (10th Cir. 1938); *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153, 102 USPQ 151 (S. D. Cal. 1954); 4 Moore, *Federal Practice*, §24.16, pp. 120-121; *7 Cyclopedia of Federal Procedure*, §§24.40-.41 (3d Ed. 1951).

In *Commercial Electrical Supply Co. v. Curtis, supra*, in affirming an order dismissing a petition for intervention, the Court stated at page 659:

> "It is the general rule that one who voluntarily intervenes in a suit in equity thereby becomes a party to this suit, is in the same situation, bound by the same orders and decrees, and subject to the same estoppel as though he had been a party from the commencement thereof" (citing cases).

In his petition, Owen Siebring complains of the lower

court's refusal to permit him to relitigate issues already determined by the consent decree prior to his intervention. Petitioner merely makes sweeping generalizations that the Circuit Court decided an important question of federal law which has not been settled by this Court, and further that the Circuit Court has departed from the accepted and usual course of judicial proceedings. However, the petitioner cannot cite any legal authorities which even remotely support his contentions. The case of *Formulabs, Inc. v. Hartley Pen Co. et al.*, 275 F. 2d 52 (9th Cir. 1960), referred to on page 8 of the petition, merely relates to the right of a licensor to intervene as party plaintiff, and has obviously nothing to do with the right of an intervenor to intervene for the purpose of contesting or relitigating issues already determined by a previous decree. Further, the authorities relied upon at the top of page 9 of the petition in support of the proposition that an intervenor may file a counterclaim, clearly lend no support whatsoever to the petitioner's argument that he should have been permitted to intervene for the purpose of contesting the prior consent decree. All of the authorities cited at the top of page 9 of the petition merely related to the right of an intervenor in a previously unlitigated case to file a counterclaim, and none thereof permitted an intervenor to assert a counterclaim for the avowed purpose of relitigating issues already determined in a prior order or decree.

In summary, the ruling by the trial court (order filed August 27, 1964, RI, pp. 84-85) that Owen Siebring's intervention was not for the purpose of permitting him to contest the validity of the Hansen patent already determined by the previous consent decree, was clearly in accordance with the applicable decisions of the U. S. Supreme

Court, as well as the various U. S. Circuit Courts of Appeal. Therefore, by his intervention, the petitioner Owen Siebring had to accept the provisions of the previous consent decree as a condition to his intervention, and he therefore entered this suit as an intervenor burdened with the finality of the issues already litigated by the prior decree.

B. Owen Siebring bound by estoppel of previous decree

The Court of Appeals below based its decision regarding the binding effect of the previous decree upon Owen Siebring principally upon his intervention binding him to accept all previous orders. Since the decision of the Court of Appeals on such issue of intervention has been shown to be in accordance with the applicable authorities, the second and third reasons presented in support of the petition are of no consequence. Owen Siebring's intervention binds him to the prior decree and precludes the other matters asserted in the petition.

However, forgetting such preclusion and replying to the petitioner's second reason for the writ, we come to the petitioner's argument that he was not bound by the consent decree because he was not a party to the agreement and was not restrained by the court's injunction. This argument was rejected by the Court of Appeals as lacking in substance, the Court stating in its decision reported at 346 F. 2d 474, 477-8, that:

> "* * * The facts are that Owen was a partner with his father in the Siebring business—he was active in its management, he was fully aware of the terms of the agreement forming the foundation for the consent decree, indeed he signed the agreement as a wit-

> ness to his father's signature, and at all times understood the import of the decree."

In connection with this second argument of petitioner, it is important to note that Owen Siebring was active in the suit prior to the settlement in 1959 and participated in settlement discussions with counsel concerning the case (R I, pp. 134-5). Therefore, at the time of the previous consent decree recognizing validity and infringement on the part of Siebring Manufacturing Company, the petitioner Owen Siebring was not only a partner with his father in Siebring Manufacturing Company, but he had actively participated in the litigation. Further, Owen Siebring recognized that *he was himself* enjoined by the consent decree and injunction from manufacturing the infringing feeders (RI, p. 135). Therefore, because of Owen Siebring's activity in the management of Siebring Manufacturing Company and his participation therein as a partner, his awareness of the terms of the settlement agreement and the consent decree, his signature as a witness to the settlement agreement, his understanding of the terms and importance of the consent decree, and his participation with counsel in discussions prior to the settlement, it is submitted that the prior consent decree entered against Claude Siebring doing business as Siebring Manufacturing Company, was res judicata and an estoppel against Owen Siebring.

The substance of the petitioners' second reason relied upon for the writ is that the Court of Appeals application of the consent decree as res judicata against him was contrary to Iowa common law (Pet., p. 9). Petitioner clearly fails to recognize that this was a patent case with exclusive jurisdiction in the federal court under *28 U.S.C.* 1338 (a). The petitioner's reliance upon state law is improper in

this case since it is clear that the doctrine of *Erie v. Tompkins*, 304 U. S. 64 (1938), has no application to non-diversity cases based upon jurisdictional grounds other than diversity. *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945).

According to the federal common law, every partner has a fiduciary relationship with every other partner, and each partner is made jointly, and generally, severally, liable for the tort liabilities incurred by the other partners. *Hanson v. Birmingham*, 92 F. Supp. 33, 42, 43 (N. D. Iowa, 1950). The partnership is also liable and a manager of the partnership is a joint infringer. *Trent v. Risdon Iron Works*, 102 F. 635, 642 (9th Cir. 1900), modifying 92 F. 375, 390; 3 *Walker on Patents*, §436.

Further, Rule 17(b)(1) of the *F.R.C.P.* authorizes an action against a partnership, *Sperry v. Assoc. of American Railroads*, 132 F. 2d 408 (2nd Cir. 1942), and the original action in this case was commenced against Claude Siebring, d/b/a Siebring Manufacturing Company, so as to include the partnership for which Claude Siebring was the principal managing agent (RI, p. 159).

It is well settled that a prior judgment is conclusive and res judicata against parties and their privies, 1B Moore, *Federal Practice*, §0.411(1), and petitioner acknowledges that he would be bound by the consent decree if he was in privity with his father Claude Siebring. However, petitioner goes on to argue that he was not in privity with his father Claude Siebring if the determination of privity is based upon the successive relationship type of privity.

Petitioner applies a very narrow concept of privity and fails to recognize that there are three different relationships which will support a determination of privity so as to bind a non-party to a previous judgment. The presence of one

or more of the following three relationships is sufficient for a holding of privity in order to bind a non-party to a previous judgment: (1) concurrent relationship to the same right or property; (2) successive relationship to the same right or property; or (3) representation of the interests of the same person. 1B Moore, *Federal Practice*, §0.411(1), p. 1255. It is submitted that the relationship between Claude and Owen Siebring is such as to require a finding of privity under one or more of the above-noted three relationships.

With regard to a mutual or concurrent relationship to the same right or property, it is noted that petitioner Owen Siebring was a partner with his father in the business of Siebring Manufacturing Company, and he participated at least partly in the management of the company (RI, pp. 158-160). Further, petitioner Owen Siebring participated in the discussions relating to the settlement agreement and recognized that he was precluded thereby from manufacturing infringing bunk feeders (RI, pp. 134-5). Therefore, it is submitted that the relationship between the partners Claude and Owen Siebring was certainly a mutual or concurrent relationship or interest in the Siebring Manufacturing Company. Further, a mutual or concurrent action existed in the conduct of infringement as recited in the settlement agreement and decree.

As noted above, privity can also exist because of representation of the same interests, and using this criterion of a relationship of representing the same beneficial interests, petitioner Owen Siebring would be in privity with the original party Claude Siebring, d/b/a Siebring Manufacturing Company. The substantial identity relationship (representation of the same interests) was the basis for the decision

of privity in *Chicago, R.I. and P. Ry. Co. v. Schendel,* 270 U. S. 611 (1926). Under the *Schendel* doctrine, a judgment adverse to the original party will bind another if he appears in the suit to represent the interest of the same beneficiary who was represented by the original party in the suit in which the judgment was rendered. Recognizing that every partner of a partnership has a fiduciary relationship with every other partner, *Hanson v. Birmingham, supra,* there would be a substantial identity or privity relationship between petitioner Owen Siebring and the original party Claude Siebring under the doctrine of the *Schendel* case, *supra.* This is because petitioner Owen Siebring and Claude Siebring were representing the same interests in their participation as defendants in the suit. The original party Claude Siebring, in addition to representing his own interest in the partnership of Siebring Manufacturing Company, was representing the beneficial interest of the other partners in the partnership, the same as petitioner Owen Siebring was representing the beneficial interests of the other partners after his intervention.

Since a partnership agreement is in effect a contract of mutual agency, each partner is made jointly, and generally, severally, liable for the contractual obligations assumed and the tort liabilities incurred by the other partners in the course of, and within the scope of, the partnership business. *Hanson v. Birmingham, supra,* at p. 43.

Petitioner Owen Siebring would also be bound by the original consent decree because he was a participating non-party. *Souffront v. Compagnie des Sucreries,* 217 U. S. 475, 486-487 (1910). A participating non-party is often termed a privy, but it is the actual participation of the non-party which provides the basis for including him within

the scope of a judgment's conclusiveness. In view of petitioner Owen Siebring' participation in the original suit prior to the consent decree, including his presence at discussions with counsel concerning settlement (RI, pp. 134-5), there is sufficient basis for holding that the consent decree was binding upon Owen Siebring as participating non-party. See 1B Moore, *Federal Practice*, §0.411(6).

In summary, even if petitioner Owen Siebring's intervention did not bind him to accept the provisions of the consent decree (which of course it did), he would still be bound by and could not relitigate the provisions of the consent decree because of his privity with his father Claude Siebring as a party in the original action. The privity of Owen Siebring may be based upon his mutual or concurrent relationship to the same rights as those of his co-partner Claude Siebring, the original party, or upon the relationship of the original party Claude Siebring and the intervenor Owen Siebring as representing the same fiduciary interests as co-partners. Further, notwithstanding the above-noted relationships which point to a determination of privity, Owen Siebring should also be bound by the consent decree as a non-party participant because of his substantial connection with and participation in the suit prior to the decree.

C. No denial of due process

The third reason relied upon by the petitioner as a ground for issuance of the writ is the assertion that the petitioner was denied due process of law because he was not permitted as an intervenor to relitigate issues already determined by the consent decree. It is believed that this third reason was thrown in somewhat as an afterthought

by the petitioner and impliedly recognizes the weaknesses of the first two reasons for the writ asserted by the petitioner.

Petitioner at no time asserted the due process argument as a part of the appeal to the U. S. Court of Appeals for the 8th Circuit, or as a part of the printed petition for rehearing by the Court of Appeals denied on June 28, 1965, a review of which is sought by the petition herein opposed.

It is certainly too late for the petitioner Owen Siebring to now assert that he has been denied due process of law. Petitioner's intervention was a deliberate, calculated, advised, and entirely voluntary entry in this case with its previous adjudication. He knew, or should have known, that his intervention in a suit where there was an existing consent decree would bind him to accept the provisions of that decree. Petitioner had his due process when he moved to intervene in a proceeding where there was an existing decree. Before Owen Siebring moved to intervene, he was fully aware of the terms of the settlement agreement which he witnessed and which formed the basis of the consent decree, and he understood the import of the decree and recognized that he was enjoined from further infringement (RI, pp. 134-5). Not only is the petitioner's assertion of a lack of due process precluded because of his relationship to the previous action sufficient to create an estoppel by judgment, but the petitioner's intervention was also a deliberate move in subordination to the previous proceeding and the consent decree entered therein.

Therefore, having entered this suit voluntarily and with full knowledge of the existence and import of the previously entered decree, petitioner cannot now at this late date complain that his own actions were a denial of due process.

IV.

CONCLUSION

None of the reasons asserted by petitioner point to any irregularity or error of the Court of Appeals in its decision which is sought to be reviewed. To the contrary, the decision of the Court of Appeals for the 8th Circuit, including its denial of a petition for rehearing, is in complete accord with the prior applicable decisions of this Court and other U. S. Courts of Appeal. Accordingly, the petition should be denied.

Respectfully submitted,

MERCHANT, MERCHANT & GOULD
PHILLIP H. SMITH
2330 Rand Tower
Minneapolis, Minnesota 55402
Attorneys for Respondents